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CPLR 3121: Doctor-Patient Privilege Is Waived If Party's Physical Condition Is in Controversy

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contrary result would have been unjust and would have contravened both the express purpose of CPLR 104 and the general rule that a party may not benefit from his own misconduct. Had the party-deponent been too ill to attend trial¹⁰⁷ or had he died prior to the trial,¹⁰⁸ his deposition could of course have been accepted as evidence.

The *Jobse* rationale therefore suggests that the "absence of the witness due to a party's wrongdoing" principle in CPLR 3117(a)(3)(ii) is applicable to all the provisions in CPLR 3117(a)(3) which permit the use of depositions. That is, depositions of an absent witness will not be admissible by a party who has purposefully created the conditions causing his absence.

CPLR 3121: Doctor-patient privilege is waived if party's physical condition is in controversy.

Ordinarily, when a plaintiff seeks to recover damages for personal injuries, he waives the doctor-patient privilege and is required to disclose medical information under CPLR 3121.¹⁰⁹ Similarly, a defendant who counterclaims for personal injuries or who affirmatively defends on the basis of his physical condition must disclose pertinent medical materials.¹¹⁰ For example, in *Fisher v. Fossett*,¹¹¹ the defendant waived the doctor-patient privilege when she stated in both a report and an examination before trial that she had blacked out at the wheel of her car because of a coronary condition.

The doctor-patient privilege and disclosure under CPLR 3121 were recently examined by the appellate division in *Koump v. Smith*.¹¹² In *Koump*, the plaintiff was injured when the defendant drove across a highway divider and crashed head-on into the plaintiff's car. The complaint alleged that at the time of the accident the defendant was intoxicated and this circumstance caused the collision; the answer denied these allegations. Pursuant to CPLR 3121, the plaintiff served

¹⁰⁷ See *Wojtas v. Fifth Ave. Coach Corp.*, 23 App. Div. 2d 685, 257 N.Y.S.2d 404 (2d Dep't 1965) (court accepted deposition of defendant who had suffered coronary thrombosis).

¹⁰⁸ See *Wank v. Herman*, 2 App. Div. 2d 867, 156 N.Y.S.2d 161 (2d Dep't 1956) (administrator permitted to read deceased plaintiff's deposition).

¹⁰⁹ *De Castro v. City of New York*, 54 Misc. 2d 1007, 284 N.Y.S.2d 281 (Sup. Ct. Kings County 1967); *Chester v. Zima*, 41 Misc. 2d 676, 246 N.Y.S.2d 144 (Sup. Ct. Erie County 1964) (plaintiff required to disclose hospital records when claiming physical injury).

¹¹⁰ See *O'Leary v. Sealy*, 50 Misc. 2d 658, 271 N.Y.S.2d 55 (Dist. Ct. Nassau County 1966) where the court stated in dictum that where the complaint alleged that the defendant was subject to epileptic fits and the defendant testified that she blacked out, the plaintiff could obtain the defendant's hospital records.

¹¹¹ 45 Misc. 2d 757, 257 N.Y.S.2d 821 (Sup. Ct. Erie County 1965).

¹¹² 29 App. Div. 2d 981, 289 N.Y.S.2d 667 (2d Dep't 1968).

notice for disclosure of the defendant's hospital records relating to his physical condition following the accident.

The appellate division held that the party seeking disclosure must produce more than a mere showing that the opposing party's physical condition has been placed in controversy as provided in CPLR 3121(a). The party must further show that his opponent has waived his right to object to the disclosure of privileged matter under CPLR 3101(b)¹¹³ or that the information sought is not privileged.¹¹⁴ Since neither waiver nor non-privilege were shown, the court refused to consider whether the defendant's condition had been placed in controversy.

The New York Court of Appeals affirmed this decision on different grounds.¹¹⁵ As to the existence of the doctor-patient privilege, it was held that the burden of proof is on the party claiming the privilege. Furthermore, Judge Scileppi stated that the party seeking disclosure may assert a waiver of the privilege merely by showing that the opponent's physical or mental condition is in controversy. With regard to the facts of the instant case, the Court stated that the defendant's physical condition may have been put in controversy if one of the following tests had been met:

[H]e affirmatively asserted it in a pleading or at an examination before trial or because he had undergone a prior physical examination which substantiated or gave credence to the allegations of the plaintiff's complaint.¹¹⁶

Thus, the defendant's physical condition was not in controversy in this case, and the hospital records were not subject to disclosure since he had merely denied plaintiff's allegations regarding his intoxication.

Prior to the Court's decision, there was some confusion as to the relationship between the doctor-patient privilege, the protection of privileged matter under CPLR 3101(b), and the right to disclosure of medical information under CPLR 3121. The key to this relationship has always been whether a party's physical condition is in controversy;¹¹⁷ if it is, the doctor-patient privilege is waived and the privilege afforded

¹¹³ CPLR 3101(b) provides that: "Upon objection by a party privileged matter shall not be obtainable."

¹¹⁴ See *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 326 (1968) discussing the apparent limitations placed upon CPLR 3121 by CPLR 3101(b).

¹¹⁵ 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969).

¹¹⁶ *Id.* at 299, 250 N.E.2d at 864, 303 N.Y.S.2d at 868. *But cf.* *Courtney v. Olsen*, 45 Misc. 2d 283, 256 N.Y.S.2d 748 (Sup. Ct. Westchester County 1965) where the defendant testified at an examination before trial that he did not see the infant bicyclist while making a left turn. The court ruled that the motorist's physical condition was not in controversy.

¹¹⁷ See 3 WK&M ¶ 3121.01 (1969).

by CPLR 3101(b) will not be available. Full disclosure will then be ordered pursuant to CPLR 3121. The Court's decision in *Koump* provides the practitioner with appellate guidelines he can utilize in seeking to determine whether or not his client's physical condition has been placed in controversy.

CPLR 3121: Second department puts bar on notice that it will strictly enforce rule governing notice of availability for physical examination.

In *Delgado v. Fogle*¹¹⁸ the rights and obligations of parties under rule I of part 5 of the Rules of the Appellate Division, Second Department¹¹⁹ were clearly delineated. In *Delgado*, which involved an action for personal injuries, the plaintiff served notice of availability for a physical examination on the defendant who neglected to appear at the specified time. Nevertheless, the trial court granted the defendant's subsequent motion to direct the plaintiff to appear for an examination.

In a strongly worded opinion, the court stated that the rule places an affirmative duty on the party served to proceed with the physical examination or to move to vacate the notice. If neither alternative is followed, the right to conduct the examination will be waived unless the defaulting party can demonstrate a reasonable excuse for its failure to appear. However, the court affirmed the trial court's liberal holding because the rule was being construed for the first time. Judge Martuscello, however, issued a strong warning to the bar, noting that the rule would be *strictly* enforced in the future.¹²⁰

CPLR 3121: Medical report not based on physical or clinical examination is not subject to disclosure.

In *Edelman v. Homes Private Ambulances, Inc.*,¹²¹ an action to recover damages for personal injuries, the plaintiff sought to preclude the use of the defendant's medical report because a copy of the report was not served on the plaintiff thirty days prior to trial pursuant to his request.¹²² The court, however, held that the report was based solely upon hospital records, and not upon a physical or clinical examination of the plaintiff. Therefore, it was not available to the plaintiff as part

¹¹⁸ 32 App. Div. 2d 85, 299 N.Y.S.2d 898 (2d Dep't 1969).

¹¹⁹ 22 NYCRR 672.1 (1963).

¹²⁰ 32 App. Div. 2d 85, 87, 299 N.Y.S.2d 898, 900 (2d Dep't 1969).

¹²¹ 32 App. Div. 2d 563, 300 N.Y.S.2d 372 (2d Dep't 1969).

¹²² CPLR 3121 requires an examining party, upon request, to furnish a copy of the examining physician's report to any party.